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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1998

EDWARD D. SOTH, JR.,

Petitioner,

v.

BALTIMORE SUNPAPERS, INCORPORATED, THE BALTIMORE SUN COMPANY, DIANA M. MURPHY, JACK ROSS, JOHN KIDWELL, JAMES BORN,

Respondents.

On Petition for a Writ of Certiorari To the United States Court of Appeals For the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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54 pp

QUESTIONS FOR REVIEW

Whether the "total preemption" doctrine of 301 of the Labor-Management Relations Act applies to a State law claim of tortious interference with the Plaintiff's employment relationship that is based on an assertedly impermissibly motivated discharge, as evidenced by the employer's failure to discipline other, similarly situated employees, and is in no way dependent upon any provision of an existing collective bargaining agreement between the Plaintiff's union and his employer?

LIST OF PARTIES TO THE PROCEEDING

1. Petitioner (previous plaintiff and appellant): Edward D. Soth , Jr.

2. Respondent (previous defendant and appellee): Baltimore Sunpapers, Incorporated, a Maryland Corporation.

3. Respondent (previous defendant and appellee): The Baltimore Sun Company, a Maryland Corporation.

4. Respondent (previous defendant and appellee): Diana M. Murphy, individually and in her corporate capacity as Vice President for Advertising and Marketing, The Baltimore Sun Company.

4. Respondent (previous defendant and appellee): Jack Ross, individually and in his official corporate capacity as Classified Advertising Manager, The Baltimore Sun Company.

5. Respondent (previous defendant and appellee): John Kidwell, individually and in his corporate capacity as Automotive Manager, The Baltimore Sun Company.

6. Respondent (previous defendant and appellee): James Born, individually and in his corporate cacapacity as Automotive Supervisor, The Baltimore Sun Company.

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OPINIONS BELOW

1. *Soth v. Baltimore Sunpapers Incorporated, et al.*,. Nos. 96-2385, 96-2390 (4th Cir., May 4, 1998), 1998-1 Trade Cases P 72,145, 1998-1 Trade Cases P 72,445, 1998 WL 225140 (4th Cir.(Md.)).

2. *Soth v. Baltimore Sun Co.*, (NO. CIV. Y-94-1349, CIV. Y-94-1350 (D.Md., July 18, 1996), 1996 WL 941821 (D.Md.).

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Fourth Circuit issued on May 4, 1998, the opinion that Petitioner asks this Court to review. This Court has jurisdiction on the basis of 28 U.S.C. Sec. 1254(1).

STATUTES INVOLVED IN THE CASE

1. 29 U.S.C. 185(a) (West 1978) (§ 301(a) of the Labor Management Relations Act).

(a) Venue, amount, and citizenship

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

2. Md. COMMERCIAL LAW Code Ann. @ 11-204 (1995)

@ 11-204. Prohibited conduct; unlawful contracts, combinations, and conspiracies

(a) Prohibited conduct. -- A person may not:

(1) By contract, combination, or conspiracy with one or more other persons, unreasonably restrain trade or commerce;

(2) Monopolize, attempt to monopolize, or combine or conspire with one or more other persons to monopolize any part of the trade or commerce within the State, for the purpose of excluding competition or of controlling, fixing, or maintaining prices in trade or commerce;

(3) Directly or indirectly discriminate in price among purchasers of commodities or services of like grade and quality, if the effects of the discrimination may:

(i) Substantially lessen competition;

(ii) Tend to create a monopoly in any line of trade or commerce; or

(iii) Injure, destroy, or prevent competition with any person who grants or knowingly receives the benefit of the discrimination or with customers of either of them;

* * *

(5) Discriminate in favor of one purchaser against another purchaser of a commodity bought for resale, with or without processing, by contracting to furnish, furnishing, or contributing to the furnishing of any service or facility connected with the processing, handling, sale, or offering for sale of the commodity on terms not accorded to all purchasers on proportionally equal terms; or

* * *

(b) Conduct not prohibited. – Subsection (a) (3) through (6) of this section does not prevent:

* * *

(2) A person engaged in selling a commodity or service from selecting his own customers in bona fide transactions and not in restraint of trade;

* * *

Statement of the Case

Edward D. Soth, Jr., the Petitioner herein and Plaintiff and Appellant below, seeks this Court's reversal or vacatur of the Fourth Circuit's summary affirmance, predicated upon and supporting the district court's finding of "total preemption" by Section 301 of the Labor Management Relations Act (LMRA:), of a grant of summary judgment to his former supervisors on his claim against them for tortious interference with his employment by discharging him from that employment.

Soth, a former advertising salesman ("account executive") for the Baltimore Sunpapers, contends that he was fired for protesting his superiors' decision to offer space for a full-page ad, at a heavily discounted price, to one of his auto-dealer clients -- but not to others, and particularly not to the dealership that previously had held a long-term contract with the newspaper to run an ad in the space in question. [1]

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[1] Before filing the actions that give rise to this present Petition, Soth attempted unsuccessfully to secure relief from his discharge through arbitration, pursuant to the collective bargaining agreement between his union and the Sunpapers, and filed untimely charges with the National Labor Relations

Soth contends further that the selective manner in which the ad space was offered constituted price discrimination, in violation of the Maryland Anti-Trust Act, *Maryland Code* Commercial Law, Sec. 11-204. Thus, he contends, his discharge violated a "clear mandate of public policy" and gave rise to his claim for an "abusive discharge" under the doctrine announced in *Adler v. American Standard Corp.*, 291 Md. 31, 47 (1981).

If the four Defendant management officials who fired Soth were acting only in further of their own, private interests and not in furtherance of the employer's interests, then these individuals are liable for tortious interference with Soth's employment. *See* also *Marrs v. Marriott Corp.*, 830 F. Supp. 274, 282-283 (D.Md. 1992), in which the court recognized that a managerial employee can take adverse action against a subordinate for only private reasons and thus be liable for tortious interference, although, more commonly,

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...Continued...

Board and the U.S. Equal Employment Opportunity Commission. He also filed a complaint in the U.S. District Court for the District of Maryland. *See, Soth v. Washington-Baltimore Newspaper Guild, et al.*, Civ. No. HAR 91-2762 (D.Md. Oct. 13, 1992), 1992 WL 296726 (D.Md.).

the management official acts in furtherance of his employer's interests, and within the scope of his employment, and thus may not be held liable for tortious interference. *Continental Cas. Co. v. Mirabile*, 52 Md.App. 387 (1982), cert. denied 294 Md. 652 (1982).

To reach his abusive discharge claim and other claims, the district court first found that his tortious interference claim against his former superiors was subject to Section 301's total preemption. [2/]

Applying an analysis not argued or addressed by either side, the district court concluded, *sua sponte*, that a tortious interference claim requires interference with a *contractual relationship*: "Soth must prove that a third party intentionally induced a breach of an existing contract". District Court's Memorandum, at A-18. Furthermore, for this

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[2/] As noted *infra*, the Fourth Circuit's removal jurisprudence would have allowed the district court to reach the merits of Soth's state law claims *even in the absence of a determination of whether it has removal jurisdiction*. Soth urges this Court to address that issue, too, so that any remand by this court on the preemption issue will be not be vitiated by a decision that bypasses the jurisdictional issue to address the merits of the State law claims. In sum, Soth seeks unqualified remand to the State court.

conclusion the district court purported to rely on authorities in which the Court of Appeals of Maryland *expressly held that a contractual relationship is NOT essential to a tortious interference claim*. *See, Macklin v. Robert Logan Assoc.*, 334 Md. 287, 297 (1994) (referring to two varieties of tortious interference), citing *Natural Design, Inc. v. The Rouse Co.*, 302 Md. 45, 69, 485 A.2d 663, 675 (1984), wherein the court observed:

> [T]he two general types of tort actions for interference with business relationships are inducing the breach of an existing contract and, more broadly, *maliciously or wrongfully interfering with economic relationships in the absence of a breach of contract.* [Italics supplied.]

In addition to the tortious interference claim against the individual Defendants, Soth sued all of the Defendants for an "abusive" or wrongful discharge, brought pursuant to the doctrine announced in *Adler v. American Standard Corp.*, 291 Md. 31, 47 (1981). Soth brought claims also for violation of the Maryland Anti-Trust Act, *Maryland Code* Commercial Law, § 11-204; civil conspiracy; and, in only one of the two actions that were filed initially in the State court, a claim under 42 U.S.C. § 1981 for his discharge as an act of retaliation for his opposition to racial discrimination

perpetrated by Defendants against another employee, an African-American. [v]

Of interest herein are only the tortious interference claim, which the district court found to be preempted by Section 301 and thus to confer federal jurisdiction, and, to support Soth's argument against preemption of the tortious interference claim, the abusive discharge claim.

Soth urges that this Court grant certiorari to reverse the lower courts' determinations that removal jurisdiction existed, on the basis of Section 301 "total preemption", and to order remand to the State court without a ruling on the merits of his State law claims.

Statement of facts.

Soth was discharged from his employment by the Baltimore Sunpapers and unsuccessfully arbitrated his discharge through his union and the collective bargaining

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[v] As the district court noted, A-23-24, Soth filed two actions in State court, one with the Section 1981 claim and the other with only State law claims. This was indeed a tactic invoked to preserve the Plaintiff's choice of forum, which amounted essentially to splitting his cause of action. The Court of Appeals of Maryland has ruled explicitly that splitting causes of action is permitted. *Jones v. Speed*, 320 Md. 249, 259 (1990).

agreement (CBA). The issue of why Soth was singled out for disciplinary action allegedly for engaging in outside activities, while other Sunpapers employees engaged far more flagrantly than he in such activities but were unpunished, was not raised in the arbitration.

There is substantial support for Soth's contention that his superiors fired him in an attempt to cover-up their actions that cost their employer many thousands of dollars in lost advertising revenue. Further, the Sunpapers had no interest in violating its own rate structure, as the individual Defendants (Respondents herein) did in offering space for a full-page, front-of-the-section advertisement on a selective basis.

Soth was employed, until his suspension and discharge on August 3, 1990, to sell advertising space, including in some instances all of the services that go into production of advertisements in the newspaper, to automobile dealers in the Baltimore area.

After approximately two years of employment by the Sunpapers, in August of 1989 Soth began performing "print coordination" services -- preparation of "rough layouts" or instructions for the preparation of advertisements and the

coordination of the placement of these advertisements in various newspapers other than the Sunpapers -- for the Beal GMC Truck dealership in Baltimore. Soth turned to outside activities after being offered, and turning down, a promotion to a supervisory position.

The materials that Soth prepared in his outside activities consisted of sheets with instructions thereon for the final preparation of advertisement, rather than "camera ready" ad copy. As compensation for the above described services Soth was given the use of a vehicle.

Soth picked up two additional, outside accounts, so that his total income from his outside work was approximately $2,000 per month. But at the same time he was generating $10,000 per month in advertising revenue to the Sunpapers from his outside clients. Furthermore, Soth at no time directed the placement of advertisements in an particular outlet or media, and he performed no services for his outside clients that he would have been obliged to perform for them in his capacity as an employee of the Sunpapers.

In his capacity as an ad salesman, Soth served the Al Packer dealerships. In February of 1990, the Packer group,

who had a one-year contract with the Sunpapers that was to expire on March 11, 1990, sought to negotiate, for the coming year, a reduction of $750 from its fee of $13,000 per week for a full-page ad that was published on the front page of the classified section of the Sunday Sun. The reduction would be accomplished by dropping the color from the ad. Initially the Sunpapers management did not respond to Packer's request. Soth urged that Packer's offer be accepted.

Packer's offer angered Defendant / Respondent Murphy ("Murphy"), the Sunpapers' vice-president for advertising and marketing, as was apparent to Soth from her behavior and remarks. Murphy stated to Soth and Defendant / Respondent Jack Ross, the Sunpapers' Advertising Department Manager, that she had a "philosophical problem with giving [Packer] any kind of a rate break". Soth urged that she compromise with Packer. Ross said nothing about compromising.

Defendant Respondent Born, Soth's immediate superior, told Soth that he, too, was angered by Packer's proposed rate reduction. And Defendant Respondent Kidwell, Born's boss, stated in Soth's presence that "I gave the kike bastard a

break once, and I'm not going to do it again", or words precisely to that effect.

The enmity toward Packer escalated into a decision, announced at a sales meeting, to sell to another dealer the premium ad space that Packer had been enjoying. But the sales staff was unable to find any other dealer that would pay the premium price -- approximately $13,000 per week. Finally, during the week prior to March 18, 1990, which was the first Sunday after the expiration of Packer's contract, Soth learned that the premium ad space had been offered to another dealer, the Norris Ford dealership, at one-half the price that Packer had paid for it, and that Packer had not been offered this opportunity.

Soth vigorously, but unsuccessfully protested this favored treatment of Norris. Ross told Soth that the decision would not be changed, and the Norris ad ran on March 18, 1990. Ross testified on deposition that no other advertiser was offered this opportunity. It is disputed whether the space could have been sold to any other advertiser in the limited time available.

Still outraged about the treatment of Norris and

Packer, Soth told another managerial employee -- to whom he had previously mentioned his outside activities -- what had occurred. That employee, Vicki Franz, immediately responded that this favored treatment of Norris was an anti-trust violation: "It's rate breaking, it's illegal."

Soth continued to complain to Born, Kidwell, and Ross that their treatment of Packer had been "absurd", "unethical", and was costing the Sunpapers thousands of dollars in lost ad revenue -- while Packer presumably remained willing to pay only slightly less than the premium rate for the subject ad space.

When it continued to be impossible to get other dealers to buy the premium space, Soth approached Packer and suggested that it could contract for the subject space on a long-term basis for a "contract rate" of $3,21 per line (at 2,570 lines), versus the "premium rate" that it had been paying, $4.58 per line (for the same lineage).

As Soth recalled in his affidavit submitted in support of his opposition to Defendants' motion for summary judgment, in mid-July of 1990, he proposed to Born and Kidwell that Packer would purchase the subject space at the above

contract rate. The rejected the proposal, although there was no alternative that would generate comparable revenue.

Soth protested that their favored treatment of Norris, back in March, and unfavorable treatment of Packer had constituted an anti-trust violation, and that he intended to carry his protests to the Sunpapers' Publisher and possible to the FTC (referring to the Federal Trade Commission). But first Soth said he would discuss the issue with Ross, who was not in his office on the day Soth's above-described conversation with Born and Kidwell took place.

When Ross returned, Soth renewed his contention that the treatment of Packer had been unlawful and urged that Packer be offered the subject space at the contract rate and on a long-term basis. Ross responded that he would get back to Soth on this issue. On August 5, 1990, the Packer ad returned the premium space.

On July 31, 1990, Soth was suspended for five days allegedly for operating an "advertising agency" that created a conflict of interest with regard to his responsibilities as a Sunpapers employee. When given a letter announcing his suspension, Soth also was given a writing that stated the

policy he was accused of violating. This writing was a letter signed by the Sunpapers' General Manager, Richard Basoco, and dated April 16, 1987 -- which was prior to Soth's being hired by the Sunpapers.

While at home serving the suspension, Soth received a call conveying an order from Born to be sure to "get everything in", referring to all of the advertising material that was due to run within the next several days. Although on suspension, Soth telephoned one of the Sunpapers' affiliate newspapers to make sure that the ads for which he was responsible would run as scheduled. This was precisely what Soth believed he had been ordered to do. But one of the ads had been prepared by Soth for an "outside" client, albeit during the previous week.

On August 3, 1990, Soth was called into Ross office and handed a letter stating that he was fired, effective that day, for gross insubordination.

At no time was Soth ever made aware that there was any provision of the CBA that addressed outside activities, and during his suspension and at the time of his discharge, only the Basoco letter was referred to.

The Basoco letter is addressed to "[a]ll Baltimore Sun employees", and not just to members of the union to which Soth belonged. The letter begins: "Recently, questions have come to my attention concerning *certain employees who have engaged in outside business activities*." [Italics supplied.]

Furthermore, in neither the suspension letter nor the subsequent discharge letter, which was dated August 3, 1989, is there any mention of the CBA or any provision of the CBA concerning outside employment. Indeed, in the discharge letter Plaintiff is alleged to have violated "*The Baltimore Sun Company policy* against conflicts of interest or apparent conflicts of interest in outside activities". [Emphasis supplied.]

In the course of the instant litigation, Soth has developed evidence that at least five other employees who engaged in outside activities and were not discharged and were not discharged. One such employee for many years had a paid, outside position in which he was in charge of advertising at the Baltimore Boat Show while he remained an advertising salesman for the Sunpapers; his Boat Show functions

including the sale of advertising in direct competition with the Sunpapers. This individual also was found to be performing Boat Show functions while at his work station at the Sunpapers.

Another co-employee of Soth was reprimanded for repeatedly soliciting Sunpapers' advertising customers to buy insurance -- on company time. Another served as advertising manager of one the Sun's zoned editions while also advertising in that edition to solicit business as a real estate agent. And at least two other Sunpapers employees are well-known columnists who also appear as commentators on local television and radio.

ARGUMENT

1. The lower courts erred in concluding that review of the collective bargaining agreement between Petitioner's union and his employer was essential to determining Petitioner's claim of tortious interference with his employment.

As the district court noted, "[i]f the resolution of a state tort claim requires interpretation of a CBA [collective

bargaining agreement], then that claim is preempted by section 301." *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 405- 406, 108 S.Ct. 1877, 100 L.Ed.2d 410 (1988). The district court then concluded that necessarily a claim of tortious interference with Soth's "employment" required interpretation of the CBA, since the CBA governed Soth's employment relationship.

To reach this conclusion the district court plainly misstated Maryland law, positing that such a claim of tortious interference required that Soth prove the existence of a contract, which then would be examined to determine the scope of the respective duties of the parties to the contract, *i.e.*, Soth's union and his employer.

But in fact Maryland law does not require proof of an existing contract as an element of tortious interference:

> [T]he two general types of tort actions for interference with business relationships are inducing the breach of an existing contract and, more broadly, *maliciously or wrongfully interfering with economic relationships in the absence of a breach of contract.* [Italics supplied.]

Natural Design, Inc. v. The Rouse Co., 302 Md. 45, 69, 485 A.2d 663, 675 (1984).

Curiously, Senior Judge Young, who rendered the

district court's opinion, had presided in an case in which he held that a contract was unnecessary for a claim of tortious interference with economic relations and expectations.

Furthermore, it is clear in Maryland law that, even if a contract exists, recovery on a claim of tortious interference does not require a showing that the contract was breached:

> "[P]roof of breach of contract is not an essential element of the tort." > Lake Shore Investors v. Rite Aid Corp., 67 Md.App. 743, 509 A.2d 727, 729 (Md.Ct.Spec.App.1986); see also > Goldman v. Harford Road Bldg. Ass'n, 150 Md. 677, 133 A. 843, 845 (1926) (ruling that right of action existed against third party where contract terminated without breach); > Lucke v. Clothing Cutters Assembly, 77 Md. 396, 26 A. 505, 508 (1893) (holding union liable for wrongful interference in employment termination despite absence of employment contract).

Trimed, Inc. v. Sherwood Medical Co., 977 F.2d 885, 889 (4th Cir. 1992), *affirming* 772 F.Supp. 879 (D.Md. 1991), in which Senior Judge Young, who presided herein, recognized and quoted the same principles as those quoted *supra*. *Id.* at 882-883.

The facts in this case are similar to those addressed by this Court in *McDonald v. Santa Fe Transportation Systems*, 427 U.S. 273, 96 S.Ct. 2574, 49 L.Ed.2d 493, 12 Fair Empl.Prac.Cas. (BNA) 1577, 12 Empl. Prac. Dec. P 10,997

(1076). There, the employer found that a group of both black and white employees had committed serious misconduct. The white employees were fired; the black employee was not fired. This court found that these facts made out a claim of race discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e, *et seq.* (1997) ("Title VII"), and the Civil Rights Act of 1870, 42 U.S.C. 1981. [4]

Here, it is not the managerial employees' *racial* animus about which Soth complains, [5] but that his discharge was impermissibly motivated by his superiors' animus against him for resisting and protesting what Soth regarded as price discrimination. Had this Court applied in *McDonald* the reasoning applied here by the lower courts, it would have denied relief to the discharged white employees simply because they were found to have committed the misconduct in question, without further analysis. Further analysis, beyond the simple determination that misconduct was

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[4] The employees' union was sued also in *McDonald* for acquiescing in the discriminatory discharges of the white employees.

[5] There was an initial claim under 42 U.S.C. 1981, which became determined that the 1991 Civil Rights Act did not apply retroactively.

committed, to determine the *actual* motivation for the discharge. And the fact that other employees of the Sunpapers committed similar misconduct and were never punished adds considerable weigh to Soth's contention that he was fired, not for his outside activities, but for his protests and threats to report to the publisher and the Fair Trade Commission that conduct.

Thus, Soth would be claiming that his discharge was wrongful even if there had never been a CBA. For what is implicated here is not the CBA but the public policy that Soth sought to vindicate, the Maryland Anti-Trust Act.

In *Lingle*, *supra*, and *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246, 114 S.Ct. 2239, 512 U.S. 246, 114 S.Ct. 2239 (1994), this court has given strong support to the proposition that Section 301 preemption should not be used to prevent employees from vindicating rights conferred upon them from sources other than CBAs. Thus in *Norris*, this court said as follows:

> "[P]urely factual questions" about an employee's conduct or an employer's conduct and motives do not "requir[e] a court to interpret any term of a collective- bargaining agreement." *262 [*Lingle*,] 486 U.S., at 407, 108 S.Ct. at 1882. The state-law retaliatory discharge claim [in *Norris*] turned on just

> this sort of purely factual question: whether the employee was discharged or threatened with discharge, and, if so, whether the employer's motive in discharging her was to deter or interfere with her exercise of rights under Illinois worker's compensation law.
>
> While recognizing that "the state-law analysis might well involve attention to the same factual considerations as the contractual determination of whether Lingle was fired for just cause," *id.*, at 408, 108 S.Ct., at 1883, the Court disagreed that "such parallelism render[ed] the state-law analysis dependent upon the contractual analysis. For while there may be instances in which the National Labor Relations Act pre-empts state law on the basis of the **2249 subject matter of the law in question, S 301 pre-emption merely ensures that federal law will be the basis for interpreting collective-bargaining agreements, and says nothing about the substantive rights a State may provide to workers when adjudication of those rights does not depend upon the interpretation of such agreements. In other words, even if dispute resolution pursuant to a collective-bargaining agreement, on the one hand, and state law, on the other, would require addressing precisely the same set of facts, as long as the state- law claim can be resolved without interpreting the agreement itself, the claim is 'independent' of the agreement for S 301 pre-emption purposes." *Id.*, at 408-410, 108 S.Ct., at 1883.

Norris, *supra* at 512 U.S. 246, 261-262, 114 S.Ct. 2239, 2248-2249.

Soth submits that it is quite telling that the district court did *not* find his common-law abusive discharge to be subject to Section 301 preemption.

Soth's position herein is almost precisely that spelled out in the following passage from the decision of the Court of Appeals of Maryland in *Finch v. Holliday-Tyler Printing, Inc.*, 322 Md. 197, 586 A.2d 1275, 6 BNA IER CAS 823, 6 BNA IER CAS 823, 124 Lab. Cas. (CCH) P57,219 (1991):

> Lingle requires deference to an arbitration procedure whenever construction of the CBA is at issue. Lingle, however, does not require initial resort to arbitration when there is no need to construe the CBA or when the issue of whether or not the CBA was violated is irrelevant to the abusive discharge action. Lingle, 486 U.S. at 413, 108 S.Ct. at 1885, 100 L.Ed.2d at 423; [***13] cf. Childers v. Chesapeake & Potomac Telephone Co., 881 F.2d 1259 (4th Cir.1989) (court did not address whether resolution of state-law claim required interpretation of CBA but instead held that, as a matter of Maryland law, an employee who fails to exhaust contract remedies cannot bring wrongful discharge claim in state court).
>
> In this tort action, Finch is not claiming that Employer had no right to discharge him. The nature of Finch's abusive discharge claim is that Employer may have had a right to discharge him under the CBA but that Employer abused that right because its motivation was solely to retaliate against him for filing workers' compensation claims. In DeBleecker v. Montgomery County, 292 Md. 498, 506, 438 A.2d 1348, 1352-53 (1982), a case involving [**1280] discharge of an at will public employee for exercising constitutional rights, we said,
>
> > "The common law rule, applicable in Maryland, is that an employment contract of an indefinite duration, i.e., at will, can be legally terminated at the pleasure of

either party at any time. The rule is inapplicable, however, if the decision to terminate the public employment was [***14] made because of the employee's exercise of constitutionally protected first amendment rights. Thus, while it was within the power of the defendants to remove DeBleecker from his position, their decision to discharge him 'would not have been lawful if it was made because of [DeBleecker's] exercise of constitutionally protected first amendment rights.'" (Citations omitted.)

[*206] The same reasoning applies to an at will "worker fired for exercising his statutorily conferred right to file a workmen's compensation claim." Adler, 291 Md. at 37, 432 A.2d at 468 (citing Frampton v. Central Indiana Gas Company, 260 Ind. 249, 297 N.E.2d 425 (1973)). In the case of a contract employee, a claim for abusive discharge begins with the assumption that it is irrelevant whether the right to discharge exists under the employment contract. The issue is whether the employer abused that right.

We have recognized in Maryland that "[a]s a general rule, parties are free to contract as they wish [but a] contractual provision that violates public policy is invalid . . . to the extent of the conflict between the stated public policy [***15] and the contractual provision." State Farm Mut. v. Nationwide Mut., 307 Md. 631, 643, 516 A.2d 586, 592 (1986) (citation omitted). In Ewing, we stated that "the parties to a collective bargaining agreement are not free to 'opt out' of legitimate state controls simply by agreeing to impermissible conditions and claiming federal protection through pre-emption." 312 Md. at 54, 537 A.2d at 1177. By the same token, an employer may not abuse its right to discharge employees by manipulating contract provisions to circumvent the clear mandate of Maryland public policy.

Finch claims that Employer manipulated the terms of the

layoff so that it would reach his seniority level with the insidious intent of wrongfully discharging him in violation of Maryland public policy. While it is possible, indeed probable, that Employer comported with the terms of the CBA, it does not necessarily follow that the discharge was not abusive. The Supreme Court recognized this fact in Lingle, where the Court noted, "even if an arbitrator should conclude that the contract does not prohibit a particular discriminatory or retaliatory discharge, [***16] that conclusion might or might not be consistent with a proper interpretation of state law." Id. at 413, 108 S.Ct. at 1885, 100 L.Ed.2d at 423.

[*207] In the instant case, there is no need to resort to arbitration because the issue addressed by arbitration, whether the layoff procedure was accomplished in conformity with the CBA, would not itself be determinative of the wrongful discharge claim. Even if all of the appropriate CBA layoff procedures were followed and there was no breach of the CBA, Finch could still recover if the layoff procedures, although permissible under the CBA, were utilized solely as a pretext to discharge Finch because he filed workers' compensation claims. It is not necessary that Finch first exhaust the CBA grievance procedures.

Furthermore, the Fourth Circuit's reliance on the CBA for the rule that it concluded was applied in the discharge of Soth ignores the factual basis for concluding that the authority invoked in the subject discharge was not the CBA, as noted supra.

The lower courts also have discounted the force of the "temporal proximity" between Soth's suspension and his final disagreement with his superiors over the disputed ad space.

Furthermore, the reason for Plaintiff's discharge as expressed in the letter of August 3, 1989, was that Plaintiff had allegedly been "grossly insubordinate and clearly [had] violated the terms and conditions of your suspension." [Emphasis supplied.] Surely a determination of whether of not Plaintiff was "grossly insubordinate" does not depend upon any interpretation of the CBA. Indeed, there is absolutely no language in the excerpt from the CBA that is included in the record, A. 451, et seq., that defines or even mentions gross or simple insubordination. Rather, there is a one-sentence subsection of the section on "Job Security" that reads as follows: "Section 8.3 -- Just and Sufficient Cause. There shall be no other discharges except for just and sufficient cause." [Emphasis and bold print in

original.]

Also, the tortious interference claim set forth in Count III was brought against only the individual Defendants, not the corporate Defendants, as such claims are delimited by Maryland law. See, e.g., Continental Cas. Co. v. Mirabile, 52 Md.App. 387 (1982), cert. denied 294 Md. 652 (1982), and Marrs v. Marriott Corp., 830 F. Supp. 274, 282-283 (D.Md. 1992).

It is instructive also that Plaintiff never sought relief for a breach of the CBA, which as noted supra would have been barred by limitations in any event, but rather for interference with his "economic and employment relations."

Petitioner submits that there was never any need to interpret the CBA in order to determine Plaintiff's tortious interference claim.

Furthermore, and the court's determination of Section 301 preemption of the tortious interference claims is

inconsistent with the court's determination that it had only supplemental jurisdiction of the abusive discharge claim, set forth in Count I.

This inconsistency is particularly puzzling when it is considered that the abusive discharge and tortious interference claims are identical except that the individual Defendant-actors are alleged, for the tortious interference claim, to have acted for their own, private purposes and not in furtherance of any interest of the corporate Defendants. Obviously, if the CBA need not be interpreted in order to determine whether Plaintiff's discharge was motivated by a desire to retaliate in violation of public policy, then the same determination, without regard to the CBA, could be made with respect to acts of the individual Defendants that are alleged to have been perpetrated for personal reasons.

Finally, the district court's conclusion that the tortious interference claim was preempted by Section 301

would wreak havoc with Maryland's common law doctrine of abusive discharge. If Section 301 preemption insulates individual managers from liability, on a tortious interference theory, for effecting for private purposes a discharge that violates public policy, then, on what principled basis could an employer be liable for a discharge that violates public policy?

In sum, Soth submits that it was error for the district court to have denied his motion to remand because of the perceived "total preemption" of Section 301. The court should have recognized that it lacked subject matter jurisdiction of the case raising only State law claims.

Conclusion.

This case demonstrates the need for this Court to fortify the requirement that the standard for removal be strictly applied, and the further need to buttress the State courts' opportunity to accommodate variations in the rights of

Conclusion.

This case demonstrates the need for this Court to fortify the requirement that the standard for removal be strictly applied, and the further need to buttress the State courts' opportunity to accommodate variations in the rights of employees as those rights are conferred in various jurisdictions.

For the foregoing reasons, Petitioner urges that this Court issue its writ of certiorari to reverse or vacate the Fourth Circuit's affirmance and to order remand of the instant cases to the State court.

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--- F.3d ----
1998-1 Trade Cases P 72,145,
1998-1 Trade Cases P 72,445
Unpublished Disposition
(Cite as: 1998 WL 225140 (4th Cir.(Md.)))

Edward D. SOTH, Jr., Plaintiff-Appellant,

v.

BALTIMORE SUNPAPERS, INCORPORATED, a Maryland Corporation; The Baltimore Sun Company, a Maryland Corporation; Diana M. Murphy, formerly known as Diana M. Zinda, individually and in her corporate capacity as Vice President for Advertising and Marketing; Jack Ross, individually and in his official corporate capacity as Classified Advertising Manager; John Kidwell, individually and in his corporate capacity as Automotive Manager; James Born, individually and in his corporate capacity as Automotive Supervisor,

Defendants-Appellees.

Edward D. SOTH, Jr., Plaintiff-Appellant,

v.

BALTIMORE SUNPAPERS, INCORPORATED, a Maryland Corporation; The Baltimore Sun Company, a Maryland Corporation; Diana M. Murphy, formerly known as Diana M. Zinda, individually and in her corporate capacity as Vice President for Advertising and Marketing; Jack Ross, individually and in his official corporate capacity as Classified Advertising Manager; John Kidwell, individually and in his corporate capacity as Automotive Manager; James Born, individually and in his corporate capacity as Automotive Supervisor,

Defendants-Appellees.

Nos. 96-2385, 96-2390.

United States Court of Appeals, Fourth Circuit.
Argued: April 9, 1998.
Decided: May 4, 1998.

Appeals from the United States District Court for the District of Maryland, at Baltimore, (CA-94-1349-Y, CA-94-1350-Y); Joseph H. Young, Senior District Judge.

ARGUED: Glen Marcus Fallin, Westminster, Maryland, for Appellant.

Darrell Robert VanDeusen, KOLLMAN & SHEEHAN, P.A., Baltimore, Maryland, for Appellees.
ON BRIEF: Randi A. Klein, KOLLMAN & SHEEHAN, P.A., Baltimore, Maryland, for Appellees.

Before NIEMEYER, WILLIAMS, and MOTZ, Circuit Judges.

OPINION

PER CURIAM:

*1 This consolidated appeal arises from two suits originally filed by Edward D. Soth, Jr., in the Circuit Court for Baltimore City against his former employer, Baltimore Sunpapers, Inc. and the Baltimore Sun Company, and four of the Sunpapers' former or current managers (collectively the Defendants). The two suits alleged identical state law claims of abusive discharge, violations of the Maryland Antitrust Act, tortious interference with contract, and civil conspiracy. One of the suits, however, also contained a retaliation claim pursuant to 42 U.S.C.A. § 1981 (West 1994). The Defendants

removed both suits on the basis that Soth's state law claims were completely preempted by § 301 of the Labor Management Relations Act, 29 U.S.C.A. § 185(a) (West 1978). The district court granted Soth's request to withdraw his § 1981 claim and consolidated the suits for consideration of Soth's motion to remand and the Defendants' motion for summary judgment. Soth appeals the district court's order denying Soth's motion to remand and granting summary judgment in favor of the Defendants on all of Soth's claims. Finding no error, we affirm.

We review a district court's grant of summary judgment de novo. See Higgins v. E.I. DuPont de Nemours & Co., 863 F.2d 1162, 1167 (4th Cir.1988). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c); see also Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). In considering whether summary

judgment is proper, all inferences to be drawn from the underlying facts must be viewed in the light most favorable to the non-moving party. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). Viewed in the light most favorable to Soth, the facts are as follows.

Soth was employed in September of 1987 by the Sunpapers as an automotive advertising sales representative. His primary duty was selling advertising space in the Baltimore Sun, the Evening Sun, and the Sunday Sun to specific automotive dealership accounts within a certain geographical area. Soth's immediate supervisor was James Born. Born reported to automotive sales manager John Kidwell, who reported to the classified advertising manager, Jack Ross, who reported to the vice-president of advertising and marketing, Diana Murphy-- the four individual defendants named in Soth's complaint.

Soth's employment was governed by a Collective Bargaining Agreement (CBA) between the Washington-Baltimore

Newspaper Guild (the union) and the Baltimore Sun Company. Article VIII of the CBA provided that an employee may not be discharged except for just and sufficient cause. Article XX, § 20.1, governing conflicts of interest and the right to engage in outside activities, provided:

o*2 Employees shall be free to engage in any activities outside their working hours which do not constitute service for any interest or publication in competition with the[Sun]. No employee, without permission of the [Sun], shall use in the course of such activities any material or featured title of the [Sun] or exploit in any way the employee's connection with the [Sun].

(J.A. at 402.)

On July 30, 1990, the Sunpapers learned that Soth was engaging in advertising in violation of the CBA's clause restricting employees from engaging in outside activities in competition with the Sunpapers.

Soth was seen at Brown's Toyota dealership by George Stinebaugh who handled the Sunpapers' account there. Soth

admitted that he was meeting with the General Manager of Brown's to discuss the possibility of a future business relationship in case he ever left the Sunpapers. Soth concedes that since 1989, he performed "print coordination" services and prepared "rough layouts" for placement in newspapers other than the Sunpapers for the Beal GMC Truck, Al Packer Lincoln Mercury, and Harco Oldsmobile dealerships. In exchange for these advertising services, Beal provided Soth with a 1987 GMC Jimmy Truck; Al Packer paid him $1,000 a month; and Harco paid him $750 per month. Soth earned the equivalent of approximately $24,000.00 per year for his outside advertising work.

On July 31, Soth was notified in writing that he was being placed on a five- day suspension without pay. Jack Ross, one of Soth's supervisors, reviewed the suspension letter with him. Defendants claim that during his suspension, Soth placed two advertisements for his personal advertising clients. Soth claims that the work he did during the suspension was for the Sunpapers and was in response to a telephone call made by one of his coworkers, Rich Watkins,

on behalf of Soth's direct supervisor, Born. Soth concedes, however, that during his suspension he called the Harford County Sun, one of the Sunpapers' suburban editions, and instructed the newspaper to rerun a Harco Oldsmobile dealership advertisement that he had prepared a week earlier. On August 3, 1990, Soth was notified in writing that he was being discharged immediately for gross insubordination for violating the terms of his suspension by continuing to engage in the activity of outside advertising by placing ads in the Baltimore Sun and the Harford County Sun on behalf of Harco Oldsmobile.

Soth challenged his discharge through the grievance and binding arbitration provisions of the CBA. On March 25, 1991, the arbitrator, after a two-day hearing and testimony from fourteen witnesses, determined that the employer "had just and sufficient cause" for suspending and discharging Soth, and that Soth was not deprived of due process by the employer. (J.A. at 399.) On August 19, 1991, Soth filed an unfair labor practice charge with the NLRB, claiming that the Sunpapers had terminated him and refused to reinstate him

because of his activities on behalf of the Washington-Baltimore News Guild. The NLRB Regional Director determined that Soth's charge did not warrant the issuance of a complaint because it was untimely. Soth appealed that decision, but the NLRB confirmed the Regional Director's determination that the charge had not been timely filed and that further proceedings were therefore barred. Soth next filed charges with the EEOC and the American Arbitration Association which were also dismissed as untimely.

*3 Soth then filed a complaint in the United States District Court for the District of Maryland. The district court dismissed Soth's complaint on October 13, 1992, for lack of subject matter jurisdiction, failure to state a claim pursuant to Fed.R.Civ.P. 12(b)(6), and for failure to serve the summons and complaint within 120 days from filing pursuant to Fed.R.Civ.P. 4(j). Soth then filed the two suits in the Circuit Court for Baltimore City which were removed by the Defendants and are presently before us. In those suits Soth claimed that the real reason for his discharge was retaliation

for his opposition, six months prior to his termination, to the Sunpapers' decision to offer one automobile dealership a full-page, front-of-section advertisement at one-half of the price that another dealership had regularly paid for it, which Soth believed violated Maryland's Antitrust Act. Specifically, Soth claims that the placement of this advertisement constituted price discrimination and that he was discharged because he threatened to tell the publisher of the Sunpapers and the FTC.

The district court denied Soth's motion to remand, determining that federal jurisdiction over the consolidated suits was proper notwithstanding Soth's withdrawal of his § 1981 claim because Soth's claim for tortious interference with contract was completely preempted by § 301(a) of the Labor Management Relations Act of 1947, 29 U.S.C.A. § 185(a) (West 1978). [FN*] The district court exercised supplemental jurisdiction over Soth's remaining state law claims. See 28 U.S.C.A. § 1367 (West 1990). The district court held that Soth's claim for tortious interference with contract was barred by the six month statute of limitations for § 301 claims. As to Soth's claims under the Maryland

Antitrust Act, the district court concluded that Soth had not raised a genuine issue of material fact as to whether a monopoly power existed and was maintained in the relevant market through the Sunpapers' half- price discounting of one advertisement on one day. Furthermore, the district judge stated that no evidence of competitive injury had been introduced in support of Soth's price discrimination claim. The district court noted that Soth's claim for abusive discharge required Soth to demonstrate that he was discharged in violation of a clear mandate of public policy, see Adler v. American Standard Corp., 291 Md. 31, 432 A.2d 464, 473 (Md.1981), and that his conspiracy claim required a showing that the Sunpapers had agreed to commit an unlawful act, see Yousef v. Trustbank Savings, 81 Md.App. 527, 568 A.2d 1134, 1139 (Md.Ct.Spec.App.1990). Because the district court concluded that the Sunpapers did not violate the Maryland Antitrust Act, it followed that there was no violation of public policy and no unlawful act. Accordingly, the district court granted summary judgment for the Defendants on all of Soth's claims.

FN* These suits present an exception to the general rule that "federal preemption defenses do not ordinarily permit federal

courts to exercise subject matter jurisdiction over claims that a plaintiff predicates on state law." See Custer v. Sweeney, 89 F.3d 1156, 1165 (4th Cir.1996). The exception is "complete preemption" and that has only been found in a few cases, including § 301 of the Labor Management Relations Act. See Avco Corp. v. Aero Lodge No. 735, Int'l Assoc. of Machinists, 390 U.S. 557, 560, 88 S.Ct. 1235, 20 L.Ed.2d 126 (1968).

We have reviewed the record, briefs, and pertinent case law in this matter, and we have had the benefit of oral argument. Our careful review persuades us that the rulings of the district court were correct. Accordingly, we affirm on the reasoning set forth in the district court's thorough opinion. See Soth v. The Baltimore Sun Co., No. Y-94-1349 (D.Md. July 18, 1996).

*4 AFFIRMED

Edward D. SOTH, Jr.
v.
THE BALTIMORE SUN CO., et al.
Edward D. SOTH, Jr.
v.
THE BALTIMORE SUN CO., et al.
No. CIV. Y-94-1349, CIV. Y-94-1350.
United States District Court,
D. Maryland.
July 18, 1996.

Glen M. Fallin, Esquire, Westminster, Maryland, counsel for Plaintiff.
Darrell R. VanDuesen, Esquire, Baltimore, Maryland; Charles J. Kesslein, Esquire, Baltimore, Maryland, counsel for Defendants.

MEMORANDUM OPINION

YOUNG, Senior J.

*1 Edward D. Soth, Jr. filed two suits in the Circuit Court for Baltimore City against his former employer, The Baltimore Sun Co., and four of its former or current managers (collectively "The Sun") alleging abusive discharge, tortious interference with contract, civil conspiracy, and violations of the Maryland Antitrust Act. In one of the cases Soth also asserted a claim for discriminatory retaliation under 42 U.S.C. § 1981. Defendants removed both cases to this court, arguing that federal jurisdiction existed

over the state law claims because of preemption under 29 U.S.C. § 185(a) or supplemental jurisdiction under 28 U.S.C. § 1367. Two motions, Plaintiff's Motion for Remand and Defendants' Motion for Summary Judgment, are now pending.

I.

Soth was hired by The Sun on September 15, 1987 as an advertising sales representative. He was a member of the Washington-Baltimore Newspaper Guild, Local No. 35 of the National Newspaper Guild, AFL-CIO ("the Guild") and the terms and conditions of his employment agreement with The Sun were provided by a collective bargaining agreement ("CBA") between The Sun and the Guild. The CBA provided that employees could not be discharged without just cause and provided a procedure for the arbitration of grievances. In addition, the CBA addressed outside activities by employees as follows:

> Employees shall be free to engage in any activities outside their working hours which do not constitute service for any interest or publication in competition with the Publisher. No employee, without permission of the Publisher, shall use in the course of such activities any material or featured title of the Publisher or explain in any way the employee's connection with the Publisher.

Article XX, section 20.1. Soth was assigned to persuade specific automobile dealers to place advertisements in The Sun's papers. In this capacity he prepared layouts, handled proofs, and advised them how to best spend their money in The Sun.

Beginning in August 1989 Soth prepared advertisements and coordinated their placement in newspapers that were not owned by The Sun. On July 30, 1990, Soth visited a dealership and solicited the preparation and placement of automobile advertisements in newspapers. He states that he was exploring the possibility of the dealer hiring him if he left The Sun. The following day he was suspended by The Sun. The suspension letter stated in part that "[b]y your own admission, you are attempting to act as an advertising agency and are soliciting customers of The Baltimore Sun Company as potential clients." At that time, he was shown a letter dated April 16, 1987, which forbade employees of The Sun to "work in any capacity for a company or business with which the Company is in competition ...." Soth claims that he did not know of the non-competition rule until he received the

letter. On August 3, 1990, Soth was discharged for continuing to violate the non-competition rule during the probationary period.

*2 Soth challenged the termination through the grievance and binding arbitration provisions of the CBA. The arbitrator found that Soth's outside employment conflicted with his employment as an advertising sales representative for The Sun and that there was just cause for his suspension and discharge. Soth then filed various charges with the National Labor Relations Board, the Equal Employment Opportunity Commission, the American Arbitration Association, and the United States District Court for the District of Maryland (Civ. No. HAR-91-2762). Each forum dismissed the charges. Soth then filed two actions in the Circuit Court for Baltimore City which were timely removed to this court on May 20, 1994.

II.

A.

Soth seeks remand of case number Y-94-1350, arguing that it does not set forth a federal claim and the parties are not

diverse. Soth also seeks to withdraw his claim under 42 U.S.C. § 1981 in Y-94-1349, leaving only state law claims, and seeks remand on the ground that the Court is without jurisdiction. This Court will grant Soth permission to withdraw the section 1981 claim. The two cases now raise identical claims [FN1] and will be analyzed together.

In response to Soth's motion, The Sun argues that some or all of the state claims are preempted under section 301(a) of the Labor Management Relations Act of 1947, 29 U.S.C. § 185(a), and were properly removed under the "complete preemption" doctrine. See Avco Corp. v. Aero Lodge No. 735, 390 U.S. 557, 88 S.Ct. 1235, 20 L.Ed.2d 126 (1968), reh'g denied, 391 U.S. 929, 88 S.Ct. 1801, 20 L.Ed.2d 670 (1968). Section 301(a) grants federal courts jurisdiction over controversies involving CBAs. 29 U.S.C. 185(a). If the resolution of a state tort claim requires interpretation of a CBA, then that claim is preempted by section 301. Lingle v. Norge Div. of Magic Chef, Inc., 486 U.S. 399, 405- 406, 108 S.Ct. 1877, 100 L.Ed.2d 410 (1988). Applying this test, the Lingle court held that a claim of retaliatory discharge brought

under a state law protecting employees from discharge for filing workers' compensation claims was not preempted by section 301. Id. at 407. The court reasoned that the issue of whether or not the employer had a non-retaliatory reason for the discharge raised a factual question that did not involve interpretation of the CBA itself, even when the agreement protected employees from discharge except for just cause and provided a procedure for arbitration of grievances. Id.

In McCormick v. AT & T Technologies, Inc., 934 F.2d 531 (4th Cir.1991) (en banc), cert. denied, 502 U.S. 1048, 112 S.Ct. 912, 116 L.Ed.2d 813 (1992), the Fourth Circuit applied the Lingle test in holding that section 301 preempted claims for intentional infliction of emotional distress, negligent infliction of emotional distress, conversion and negligence in care of bailment arising out of the employer's cleaning out of the employee's locker. Noting that the plaintiff had to prove wrongful conduct for each claim and that the required degree of care varies according to the circumstances of each case, including the contractual relationship between the parties, the court held the state

claims referred to implied duties in the contract and were therefore preempted. Id. at 536-37.

*3 Thus the question before this Court is whether analysis of the state law claims requires interpretation of the CBA between The Sun and the Guild.

Count III alleges The Sun tortiously interfered with Soth's contractual rights. To maintain a claim for intentional interference, Soth must prove that a third party intentionally induced a breach of an existing contract. Macklin v. Robert Logan Assoc., 334 Md. 287, 297, 639 A.2d 112 (1994). The CBA must be reviewed to determine if it was an existing contract at the time Soth was discharged and if The Sun breached any duty provided in the agreement. Because the intentional interference claim cannot be maintained independently from the CBA, it is preempted by section 301. See International Union, UMWA v. Covenant Coal Corp., 977 F.2d 895, 899 (4th Cir.1992) (intentional interference claim under Virginia law preempted by section 301). Accordingly, this Court has jurisdiction over Count III.

Counts I, [FN2] II, and IV set forth various state law claims concerning the circumstances under which Soth was discharged. This Court has supplemental jurisdiction over these claims under 28 U.S.C. § 1367 because they stem from "a common nucleus of operative fact." See Shanaghan v. Cahill, 58 F.3d 106, 109 (4th Cir.1995); White v. County of Newberry, South Carolina, 985 F.2d 168, 171 (4th Cir.1993). Accordingly, this Court has jurisdiction over all the claims and Soth's Motion to Remand will be denied.

B.

The Sun seeks summary judgment on all counts, contending that the claims are either preempted by 29 U.S.C. § 185(a) and untimely under that statute or are unsupported by the undisputed facts in this case. Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). The party seeking summary judgment bears the initial burden of showing that there is an

absence of evidence to support the non-moving party's case. Celotex Corp. v. Catrett, 477 U.S. 317, 325, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). In response, the non-moving party, in this case Soth, "may not rest upon the mere allegations or denials of the adverse party's pleadings, but ... must set forth specific facts showing that there is a genuine issue for trial." Fed.R.Civ.P. 56(e).

As discussed above, Count III is preempted by section 301(a) of the Labor Management Relations Act, 29 U.S.C. § 185(a). Soth filed this suit in state court three and one-half years after his termination, long after the six-month statute of limitations for section 301 claims. See DelCostello v. Int'l Brotherhood of Teamsters, 462 U.S. 151, 169, 103 S.Ct. 2281, 76 L.Ed.2d 476 (1983). Because of the untimeliness of this claim, The Sun is entitled to summary judgment on Count III.

Count II alleges violation of Maryland Antitrust Act, Md.Code Ann. Comm. Law §§ 11-204(a)(2)-(3), stemming from The Sun's offer of a premium advertisement to Norris

Ford on March 18, 1990, at half the price previously charged the Al Packer Ford dealership. These sections of the Act makes it unlawful for a company to "[m]onopolize, attempt to monopolize, or combine or conspire with one or more other persons to monopolize any part of the trade or commerce within the State" or to "[d]irectly or indirectly discriminate in price among purchasers of commodities or services of like grade and quality" if the discrimination will substantially lessen competition or tend to create a monopoly. Id. Federal antitrust law is used to interpret these provisions, which mirror section 2 of the Sherman Act and section 13(a) of the Robinson- Patman Act respectively. See id. § 11-202(a)(2); Natural Design, Inc. v. Rouse Co., 302 Md. 47, 485 A.2d 663 (1984). A monopolization claim requires a showing of monopoly power in the relevant market and willful acquisition or maintenance of that power. United States v. Grinnell Corp., 384 U.S. 563, 570-71, 86 S.Ct. 1698, 16 L.Ed.2d 778 (1966). The Sun explains that it offered a full-page advertisement in the classified section to Norris Ford at half the rate previously charged Packer Ford because no dealership was willing to pay the previous rate

and a Norris Ford advertisement from the week before was the only advertisement suitable for adaptation to the full page format. Soth states in his affidavit that the discount was offered to secure employment for the spouse of a Sun employee and to punish Packer Ford for seeking modification of its contract, but these allegations are not sufficient to support his theory that one day of discounting one advertisement was a willful acquisition or maintenance of monopoly power. His uncorroborated statement does not present a genuine issue of fact under this prong of Count II.

*4 A price discrimination claim requires a showing of competitive injury. Texaco, Inc. v. Hasbrouck, 496 U.S. 543, 556, 110 S.Ct. 2535, 110 L.Ed.2d 492 (1990); Md.Code Ann. Comm. Law § 11-204(a)(3)(i)-(iii). Again, Soth has offered no evidence to show that the competition between Norris Ford and Packer Ford has diminished because Norris Ford was charged a lower price on one advertisement. Furthermore, the Act sensibly recognizes that price fluctuations due to market conditions, as here, are not antitrust violations. Md.Code Ann. Comm. Law §

11-204(b)(5). Because there is no issue of material fact under this prong of Count II, The Sun is entitled to summary judgment as to Count II.

Count I alleges abusive discharge, which requires Soth to show he was discharged in violation of a "clear mandate of public policy ...." Adler v. American Standard Corp., 291 Md. 31, 47, 432 A.2d 464 (1981). Count IV alleges conspiracy, which requires Soth to prove that The Sun agreed to commit an "unlawful act." See Yousef v. Trustbank Savings, 81 Md.App. 527, 538, 568 A.2d 1134 (1990). Since The Sun did not violate the Maryland Antitrust Act, there was no violation of public policy and no unlawful act. Accordingly, The Sun is entitled to summary judgment as to Counts I and IV.

III.

For the foregoing reasons Plaintiff's Motion to Remand is denied and Defendants' Motion for Summary Judgment is granted.

FN1. It is not mere coincidence that the two cases raise essentially the same claims. Counsel for Soth has admitted in

other litigation that he regularly files two actions in state court which are identical save that one has the federal claims omitted in an attempt to defeat defendants' removal rights. See DiCarlo v. Baltimore County, Maryland, No. MJG-95-556 (Nov. 13, 1995) (imposing costs under 28 U.S.C. § 1927 against counsel).

FN2. To maintain a claim for abusive discharge in Maryland, Soth must show that he was discharged in violation of a "clear mandate of public policy ...." Adler v. American Standard Corp., 291 Md. 31, 47, 432 A.2d 464 (1981). The public policy allegedly violated is provided by Maryland Antitrust law. Relying on McCormick, supra, The Sun argues that the wrongfulness of the discharge is determined by the CBA because Article 8 ofo the CBA governs disputes between the Sun and its employees and an arbitrator found just cause to fire Soth. This argument is foreclosed by Lingle, supra, which also reviewed a CBA with these provisions but held that a claim alleging discharge in retaliation for exercising a statutory right is not preempted because the employer's motivation for firing the employee is a "purely factual question." Lingle, supra, at 407.

29 U.S.C.A. S 185

[Current through P.L. 105-175, approved 5-11-98]

> UNITED STATES CODE ANNOTATED

> TITLE 29. LABOR
> CHAPTER 7--LABOR-MANAGEMENT RELATIONS

O SUBCHAPTER IV--LIABILITIES OF AND RESTRICTIONS

S> 185. Suits by and against labor organizations

(a) Venue, amount, and citizenship

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

* * *

(c) Jurisdiction

For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting
for employee members.

ANNOTATED CODE OF MARYLAND

*** THIS SECTION IS CURRENT THROUGH THE 1995 SUPPLEMENT
*** (1995 REGULAR SESSION) ***

COMMERCIAL LAW

TITLE 11. TRADE REGULATION

SUBTITLE 2. ANTITRUST

Md. COMMERCIAL LAW Code Ann. @ 11-204 (1995)

Section 11-204. Prohibited conduct; unlawful contracts, combinations, and conspiracies

(a) Prohibited conduct. -- A person may not:

(1) By contract, combination, or conspiracy with one or more other persons, unreasonably restrain trade or commerce;

(2) Monopolize, attempt to monopolize, or combine or conspire with one or more other persons to monopolize any part of the trade or commerce within the State, for the purpose of excluding competition or of controlling, fixing, or maintaining prices in trade or commerce;

(3) Directly or indirectly discriminate in price among purchasers of commodities or services of like grade and quality, if the effects of the discrimination may:

(i) Substantially lessen competition;

(ii) Tend to create a monopoly in any line of trade or commerce; or

(iii) Injure, destroy, or prevent competition with any person who grants or knowingly receives the benefit of the discrimination or with customers of either of them;

(4) In the course of commerce, pay or contract for the payment of anything of value to or for the benefit of a customer of the person as compensation for or in consideration of any service or facility furnished by or through the customer in connection with the processing, handling, sale, or offering for sale of any service or commodity manufactured, sold, or offered for sale by the person, unless the payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of the service or commodity;

(5) Discriminate in favor of one purchaser against another purchaser of a commodity bought for resale, with or without processing, by contracting to furnish, furnishing, or contributing to the furnishing of any service or facility connected with the processing, handling, sale, or offering for sale of the commodity on terms not accorded to all purchasers on proportionally equal terms; or

(6) Lease or make a sale or contract for the sale of a patented or unpatented commodity or service for use, consumption, enjoyment, or resale, or set a price charged for the commodity or service or discount from or rebate on the price, on the condition, agreement, or understanding that the lessee or purchaser will not use or deal in the commodity or service of a competitor of the lessor or seller, if the effect of the lease, sale, or contract for sale or the condition, agreement, or understanding may:

(i) Substantially lessen competition; or

(ii) Tend to create a monopoly in any line of trade or commerce.

(b) Conduct not prohibited. -- Subsection (a) (3) through (6) of this section does not prevent:

(1) Differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which the commodity or service is sold or delivered to a purchaser;

(2) A person engaged in selling a commodity or service from selecting his own customers in bona fide transactions and not in restraint of trade;

(3) A person engaged in selling a commodity or service from granting employee discounts to his own bona fide employees;

(4) A seller from introducing evidence to rebut a case brought under subsection (a) (3) through (6) of this section to show that his lower price or the furnishing of services or facilities to a purchaser was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor; or

(5) Price changes, from time to time, in response to changing conditions affecting the market for or the marketability of a commodity, which changing conditions include an actual or imminent deterioration of a perishable commodity, obsolescence of a seasonal commodity, distress sales under court process, or sales in good faith in discontinuance of business in the commodity.

HISTORY: An. Code 1957, art. 83, @ 38; 1975, ch. 49, @ 3; ch. 522; 1992, ch. 22, @ 1.

NOTES:
EFFECT OF AMENDMENTS. --The 1992 amendment, approved Apr. 7, 1992, and effective from date of enactment, substituted "Subsection (a) (3) through (6) of this section does" for "Subsections (a) (3) through (a) (6) of this section do" in the introductory language of (b); and substituted "subsection (a) (3) through (6)" for "subsections (a) (3) through (a) (6)" in (b) (4).